

CABAZON BAND OF MISSION INDIANS,	:	Order Vacating Decision
Appellant	:	and Remanding Case
	:	
v.	:	
	:	Docket No. IBIA 96-40-A
SACRAMENTO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	April 15, 1997

This is an appeal from a December 11, 1995, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to process Deputy Special Officer Commissions (DSOCs) for police officers of the Cabazon Band of Mission Indians (Band). For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

On April 10, 1995, the Band's Chief of Police submitted to the Superintendent, Southern California Agency, BIA, applications for DSOCs for 23 tribal police officers. The Superintendent responded on May 24, 1995, stating: "This office has contacted the Office of the Regional Solicitor and has been advised that we lack the authority to process the Special Officer Commission Applications."

The Band appealed this decision to the Area Director. In a decision issued on December 11, 1995, the Area Director stated:

This office concurs with the Solicitor's interpretation that P.L. 83-280 [1/] conferred jurisdiction over civil causes of action and criminal offenses in Indian Country to the State of California. Therefore, there is no Federal jurisdiction retained by [BIA] to confer to the Band except for hunting and fishing. The Band has not provided any documentation which indicates that the [Band] is regulating these activities within the reservation or that there is a need to regulate these activities. Furthermore, you failed to indicate any reason in support of a need for Federal law enforcement jurisdiction.

The Band appealed this decision to the Board. After filing its appeal, the Band's Chief Executive Officer wrote to the Area Director, requesting that qualified tribal police officers be issued DSOCs for the limited

1/ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1994) (PUB. L. NO. 280).

All further references to the United States Code are to the 1994 edition.

purpose of enforcing applicable fish and game laws and regulations. His letter, dated March 7, 1996, stated in part:

We believe that this new request will meet the requirements of the Cabazon Band, will enable us to provide improved law enforcement services on the Cabazon Indian Reservation, will promote cooperation between the Cabazon Tribal Police Department and the Riverside County Sheriff's Office, and will satisfy your concerns by limiting the scope of the Commissions issued to our Officers.

Nothing presently before the Board indicates that BIA responded to this letter. It appears likely that BIA has delayed acting on the Band's revised request because of the pendency of this appeal.

In its opening brief before the Board, the Band attacks the Area Director's December 11, 1995, decision on a number of grounds. It contends (1) that there is nothing in PUB. L. NO. 280 which precludes the issuance of DSOCs in PUB. L. NO. 280 states, because the Federal Government retains jurisdiction over reservation hunting and fishing in those states and because Indian tribes in those states retain authority to exercise criminal jurisdiction concurrently with the states; (2) BIA contracts with the Band and other California tribes to provide law enforcement services under the Indian Self-Determination Act; (3) BIA has issued DSOCs to police officers of other California tribes; (4) the Band actively regulates on-reservation hunting; and (5) the Band's law enforcement efforts have been seriously impeded by the lack of Federal law enforcement jurisdiction which the DSOCs would provide.

In his answer brief, the Area Director contends:

[The Band's] argument not only ignores the discretionary authority Congress granted the Secretary in issuing such [DSOCs] but, alternatively, had the Secretary issued such [DSOCs] it would place him in the awkward position of approving federal law enforcement officers' status on individuals who are protecting an activity, i.e., Class III gaming, which the Attorney General and the U.S. Attorney believe to be illegal in the State of California.

Area Director's Answer Brief at 3. The Area Director further contends that, given the relationship between the Department of the Interior and the Department of Justice with respect to law enforcement matters, and the fact that Department of Justice officials are seeking a peaceful resolution of issues concerning legality of certain tribal gaming operations in California, "until such a resolution is achieved by the chief law enforcement officer of the United States, the need demonstrated by the [Band] is inadequate, as [BIA] cannot usurp the law enforcement authority [for] which Congress has placed primary responsibility in the control of another agency." Id. at 10.

In its reply brief, the Band argues that the Area Director now gives different reasons for denial of the DSOCs than were given in the December 11, 1995, decision. Further, the Band contends, the Area Director's present argument is flawed because (1) the tribal police officers

for whom DSOCs are sought are not charged with protecting the Band's casino, which is protected by the casino's own Security Department and (2) the Department of Justice has not taken a position in opposition to the issuance of DSOCs to the Band's police officers.

In view of the arguments now put forth by the Area Director, there is a question here as to whether his December 11, 1995, decision stated BIA's true reasons for denying the DSOCs. It now appears that BIA's real reason for denial was probably its concern over the Band's casino, a concern not mentioned in the December 11, 1995, decision and not reflected in the administrative record furnished to the Board.

Apart from this problem, the record reflects what appears to be disagreement and/or confusion over the issuance of DSOCs in a PUB. L. NO. 280 state like California. At the time the Superintendent issued his decision on May 24, 1995, he evidently believed that DSOCs could not be issued in PUB. L. NO. 280 states. ^{2/} Yet, prior to that decision, the Band contends, the Superintendent and other BIA employees encouraged the Band in its efforts to qualify its police officers for DSOCs. The record shows that various BIA offices provided the Band with information about DSOCs. It also shows that BIA's Indian Police Academy conducted a BIA certification course for the Band's police officers in March 1995. The Band states that it understood completion of this course to be a prerequisite to issuance of DSOCs.

The Area Director evidently sees the matter differently than the Superintendent. His December 11, 1995, decision clearly appears to recognize the possibility that DSOCs might be issued in PUB. L. NO. 280 states for the purpose of enforcing Federal hunting and fishing laws. His brief in this appeal also recognizes the possibility that DSOCs may be issued in PUB. L. NO. 280 states. Thus, although the Band argues the point in its opening brief before the Board, the Board concludes that there is no longer a controversy as to this issue. The Board finds that the Area Director presently recognizes that DSOCs may be issued in PUB. L. NO. 280 states, at least for the purpose of enforcing Federal hunting and fishing laws.

With respect to hunting and fishing, the Area Director held that "[t]he Band has not provided any documentation which indicates that the [Band] is regulating these activities within the reservation or that there is a need to regulate these activities." The Band contends that, "at no time prior to the Area Director's decision had the Cabazon Band been asked to provide such documentation or was the Band made aware that this was even an issue in the matter." Band's Opening Brief at 6-7. Indeed, there is nothing in the record that shows that BIA requested such documentation from the Band.

If BIA made its decision based upon the Band's hunting and fishing regulatory activities, the Band was entitled to an opportunity to present evidence of those regulatory activities. If, as now appears likely, BIA made its determination based upon the Band's gaming operations, the Band

^{2/} The Superintendent's decision is actually rather cryptic, stating only that BIA lacked authority to process the DSOCs. However, the Band understood the Superintendent to have held that DSOCs cannot be issued in PUB. L. NO. 280 states, and no party has disputed that interpretation.

was entitled to an opportunity to present evidence in that regard. ^{3/} Most importantly, the Band was entitled to be informed, in the decision denying the DSOCs, of the true reason for denial. The Board has held that it is an abuse of discretion and a denial of due process to deny an application on grounds that are not communicated to the applicant. Price v. Portland Area Director, 18 IBIA 272 (1990) (application for Indian Business Development grant).

In Eastern Cherokee Tribal Community Services Committee v. Acting Eastern Area Director, 30 IBIA 1, 4 (1996), the Board stated that "[a] decision to grant or deny a DSOC is a decision which involves both expertise and judgment" and that, "in reviewing BIA decisions based upon the exercise of expertise and judgment, [the Board's] role is to determine whether BIA's decision is reasonable)) that is, whether it is supported by law and substantial evidence."

In this case, in view of the serious question as to BIA's true reason for denying the DSOCs, the Board finds that the Area Director's December 11, 1995, decision is not supported by law and substantial evidence. The Board therefore vacates that decision and remands this matter to the Area Director for further consideration.

Upon remand, the Area Director and the Band should be guided by the Bureau of Indian Affairs Manual provisions concerning issuance of DSOCs, 68 BIAM Supp. 1, Chap. 9; ^{4/} any revisions thereof; and the newly revised 25 C.F.R. Part 12, "Indian Country Law Enforcement" (effective May 2, 1997), in particular new section 12.21. See 62 Fed. Reg. 15,610 (Apr. 2, 1997).

68 BIAM § 9.1 provides:

Policy and Purpose. It shall be the policy of the Bureau of Indian Affairs (BIA) to issue Deputy Special Officer Commissions to Federal, State, local, and tribal full-time certified law enforcement officers who will serve without compensation from the Federal government, for the purpose of obtaining active assistance in the enforcement of applicable Federal criminal statutes, including Federal hunting and fishing regulations in Indian country.

In addition to section 9.1, sections 9.13 and 9.14 are relevant here because they further define the policy expressed in section 9.1.

^{3/} As noted above, the Band states that its police officers do not protect the Band's casino. The Band should have been given an opportunity to make this showing, if BIA's decision was to be based upon the premise that the officers to be granted DSOCs would be performing such a function.

^{4/} The copy of this chapter provided to the Board is dated Nov. 22, 1993.

Section 9.13 provides:

Caution. The Deputy Special Officer Commission endorses the holder with federal authority and responsibility and concomitantly places a high level of liability risk upon the U.S. Government. In order to reduce liability risks for the Government, great care should be taken to adhere to the policies and procedures set forth.

Section 9.14 provides: "Commissions. Commissions are to be issued only when a legitimate law enforcement need requires issuance. Commissions are not to [be] issued solely for the furtherance of inter-agency or public relations."

As the Board understands these provisions, DSOCs are not to be issued unless there is a need for assistance in enforcing Federal law, even though, once DSOCs have been issued, a benefit may also accrue to a tribe in the enforcement of tribal law. Further, the Board construes these provisions as authorizing BIA to consider the extent of the Federal need for assistance and, for example, to base the number of DSOCs it issues upon the number of commissioned officers who would be needed to provide that assistance.

The parties appear to agree that at least one Federal criminal statute, 18 U.S.C. § 1165, 5/ is applicable to the Cabazon Reservation. Thus, BIA's first task here is to determine whether there is a need for assistance in the enforcement of that statute, or any other Federal criminal statutes found to be applicable to the Cabazon Reservation. If BIA determines that there is such a need, it should then determine how many of the Band's police officers are needed to provide assistance in enforcing those Federal criminal statutes. 6/

5/ 18 U.S.C. § 1165 provides:

"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited."

6/ BIA might conclude, for instance, that even if some assistance is needed, that assistance could be provided by fewer than the 23 tribal police officers for whom the Band now seeks DSOCs.

Although the need for assistance undoubtedly varies from reservation to reservation, the Board notes that, on the Stockbridge-Munsee Reservation in Wisconsin, a single tribal officer held a DSOC for hunting and fishing law enforcement purposes between 1978 and 1995, when BIA declined to renew it. See Stockbridge-Munsee Community v. Acting Minneapolis Area Director, 30 IBIA 283 (1997).

At that point, BIA should consider the Band's March 7, 1996, request for limited DSOCs. The Board does not find any discussion of limited DSOCs in the text of 68 BIAM Supp. 1, Chap. 9. However, a model "Deputation Agreement," which is attached as Illustration 2 to Chap. 9, suggests the possibility that DSOCs may be limited by their terms. 7/

The filings of the parties in this appeal suggest that, if the Band's police officers are issued DSOCs, even for the limited purpose of enforcing Federal hunting and fishing laws, those officers will, by virtue of California State law, be vested with law enforcement authority extending beyond hunting and fishing enforcement authority. The Band sees this result as a benefit to the Band, while the Area Director sees it as a liability to the United States. 68 BIAM 9.13 contemplates that BIA may, and should, consider the potential liability of the United States in determining whether to issue DSOCs. However, as discussed above, the primary determination upon which BIA must base its decision to grant or deny DSOCs to the Band's police officers is whether assistance is needed in the enforcement of Federal criminal laws. 8/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's December 11, 1995, decision is vacated, and this matter is remanded to him for further consideration. 9/

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

7/ See 68 BIAM Supp. 1, Chap. 9, Illustration 2, p. 4.

8/ New 25 C.F.R. § 12.21(a) provides: "BIA will issue commissions to other Federal, State, local and tribal full-time certified officers only after the head of the local government or Federal agency completes an agreement with the Commissioner of Indian Affairs asking that BIA issue delegated commissions."

The Band has indicated that it wishes to enter into such an agreement with BIA.

9/ The Band's request for oral argument is denied.